IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HON'BLE THE CHIEF JUSTICE MR.V.K.BALI
&
THE HONOURABLE MR. JUSTICE KURIAN JOSEPH
&
THE HONOURABLE MR. JUSTICE K.BALAKRISHNAN NAIR

TUESDAY, THE 23RD JANUARY 2007 / 3RD MAGHA 1928

WA.No. 291 of 2006()

AGAINST THE JUDGEMENT/ORDER IN WPC.20284/2004 Dated 09/11/2005
.....

APPELLANT: RESPONDENT NO.3

M.U.SHERLY, W/O.P.S.SAJU,
EDASSERY HOUSE, KANJOOR P.O., ERNAKULAM DISTRICT.

BY ADV. SRI.M.M.ABDUL AZIZ (SR.)
SRI.M.A.ABDUL HAKHIM

RESPONDENTS: PETITIONER-RESPONDENT 1 & 2
---

1. THE PRESIDENT, PARAPPURAM MILK PRODUCERS CO-OPERATIVE SOCIETY LTD., NO.E.179(D), PARAPPURAM, KANJOOR, ERNAKULAM DISTRICT.

2. STATE OF KERALA, REPRESENTED BY THE SECRETARY TO GOVERNMENT, LABOUR & REHABILITATION DEPARTMENT, GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM.

3.THE INDUSTRIAL TRIBUNAL, ALLEPPEY.

BY GOVERNMENT PLEADER SRI.T.B.HOOD.
SRI.GEORGE POONTHOTTAM

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 03/01/2007, THE COURT ON 23.1.2007 DELIVERED THE FOLLOWING:

V.K.BALI, CHIEF JUSTICE AND
KURIAN JOSEPH & K.BALAKRISHNAN NAIR, JJ.

W.A. No.291 of 2006

Dated 23rd January, 2007.

J U D G M E N T

Kurian Joseph, J.

In the matter of disciplinary proceedings against an employee of a cooperative society registered under the provisions of the Kerala Cooperative Societies Act, 1969, (hereinafter referred to as 'the KCS Act') once the Registrar exercises his power under Rule 176 of the Kerala Cooperative Societies Rules, 1969 (hereinafter referred to as 'the KCS Rules'), is it open to the aggrieved employee to take recourse to the remedies under the Industrial Disputes Act, 1947 (hereinafter referred to as 'the I.D. Act') is essentially the question referred to the Full Bench. To pose a general question, is an employee subjected to disciplinary proceedings entitled to have his grievance adjudicated before an authority, Forum, Tribunal or Court, which is independent of the executive?

2. The appeal is at the instance of the employee who is the third respondent in the writ petition filed by the society. The society challenged the reference order passed by the

Government under Section 10(1)(d) of the I.D. Act, 1947, referring the dispute for adjudication before the Industrial Tribunal. The question referred is "Whether the dismissal of Smt.M.V.Sherly by the Management of Parappuram Milk Producers Cooperative Society Ltd., is legal and justifiable?" Ext.P1 is the reference order. Ext.P4 is the preliminary order passed by the Industrial Tribunal, Alappuzha wherein it has been held that the domestic enquiry conducted against the workman is "void and unsustainable". Since the management had not sought for fresh opportunity to prove the charges, the consequential Ext.P5 award was passed setting aside the dismissal and ordering reinstatement with 50% of the back wages. Exts.P1, P4 and P5 orders are under challenge at the instance of the society.

3. The learned Single Judge framed the following issues for consideration.

> "(i) Is the initiation of proceedings under the I.D. Act, after the Deputy Director had rejected the application of the delinquent, is within authority?
>
> (ii) Is the impugned Ext.P4 preliminary order is contrary to the findings in the inter-partis judgment in W.A.No.898 of 1998?
>
> (iii) Whether the Industrial Tribunal has the jurisdiction to decide the question of dismissal and reinstatement, in view of Section 7 read with Second Schedule to the I.D.Act?
>
> (iv) In passing the impugned Ext.P5 award, did the Industrial Tribunal act in excess of jurisdiction under Section 11A of the I.D.

Act?"

4. On the first issue, it was held by the learned Single Judge that ....."the delinquent, having obtained an adverse decision at the hands of the Deputy Director on his statutory petition under Rule 176 of the Kerala Cooperative Societies Rules (hereinafter referred to as the KCS Rules), is not entitled to have the said issue re-opened before any other forum". On the second issue, it was held that the reliance of the Tribunal on the direction in O.P.No.22912/97 to conduct a fresh enquiry was wrong since the judgment had already been set aside by the Division Bench. Regarding the jurisdiction of the Tribunal, in view of Section 7A(1) of the I.D.Act, it was held that Industrial Tribunals have jurisdiction to adjudicate on disputes relating to any matter whether specified in the Second Schedule or in the Third Schedule and on the fourth issue, learned Single Judge was of the view that exercise of power under Section 11A of the I.D. Act was justified. However, no relief was granted to the employee in view of the finding on issue No.1 that the Deputy Director having looked into the matter, it was not open to the employee to take recourse to the remedies under the I.D. Act.

5. The issue cannot be fully comprehended unless a

little more reference is made to the history of the case. Disciplinary proceedings were initiated against the employee who was at the relevant time working as Milk Tester under the respondent cooperative society on 25.8.1996. She was in continuous service on a permanent basis since 1990. The disciplinary authority decided to conduct a domestic enquiry. Alleging bias against the Enquiry Officer, who is said to be a counsel appearing for the management society, and also seeking time to effectively participate in the proceedings after the culmination of the case filed by the employee before the High Court, the delinquent sought time. However, the Enquiry Officer refused to grant the adjournment as requested. The employee was set ex parte. 13 out of the 15 charges were reported to be proved. The employee was dismissed from service with effect from 30.1.1997. The appeal before the Managing Committee was turned down. The Deputy Director (Dairy Development) is authorised to exercise all the powers of the Registrar under the Kerala Cooperative Societies Registration Act and Rules in relation to milk producers' cooperative societies functioning within his jurisdiction. The matter was taken up before the Deputy Director, exercising the power under Rule 176 of the KCS

Rules, 1969. The Deputy Director passed an order dated 10.3.1997 directing the management society to reconsider the matter. There is also an observation that the punishment of dismissal was disproportionate. Since the society refused to act, the employee again approached the Deputy Director and the said authority, by order dated 3.12.1997 rescinded the decision dated 29.1.1997 of the society dismissing the appellant from service. The society took up the matter before this Court in O.P.No.22912/97. The impugned order of the Deputy Director was set aside with a direction to the Society to conduct a fresh enquiry after giving sufficient opportunity to the employee. The society pursued the matter in Writ Appeal leading to the judgment in W.A.898/1998, reported in **Parappuram Milk Producer's Co-operative Society** *v.* **Deputy Director, Department of Dairy Development** (1999(1) KLT 121). The Division Bench took the view that the Registrar acted in excess of his powers under Rule 176 of the Kerala Cooperative Societies Rules in interfering with the findings of the Enquiry Officer and also in directing to conduct a fresh enquiry. It was held by the Bench at paragraph 3 that “A reading of R.176 should show that Joint Registrar can rescind the resolution only when it appears

that (1) it is ultra vires of the objects of the society; (2) it is against the provisions of the Act, Rules, Bye-laws; (3) it is against any direction or instructions issued by the Department; (4) it is calculated to disturb the peaceful and orderly working of the society; or (5) it is contrary to the better interest of the society. Taking disciplinary action against an erring employee is not intended to disturb the peaceful and orderly working of the society or cannot be said to be contrary to the better interest of the society." Again at paragraph 4 of the judgment it was held that "The Registrar under R.176 has no power to consider the adequacy of punishment or findings of the enquiry officer. He cannot also sit in appeal over the findings of enquiry committee or scrutinise the enquiry proceedings. He can only consider whether resolution passed is against the provisions of the Act or Rules made thereunder or Bye-laws. In a proceeding under R.176, Joint Registrar can certainly examine whether R.198 or any other provisions of the Act or rules or Bye-laws were violated or not, while taking disciplinary action notwithstanding the right of appeal or any other alternative remedy. In fact, it is a statutory duty of the Joint Registrar." Still further it was held that the High Court cannot direct the society to conduct a fresh enquiry. The

appeal was disposed of with a direction to the Deputy Director to consider the matter properly in the light of the observations contained in the judgment, which to the extent relevant are extracted above. The Bench also took note of the amendment introduced to Section 69 of the KCS Act permitting adjudication of a dispute by the Cooperative Arbitration Court and reserved liberty to the appellant as follows :-

> "This will not also prevent the employee from approaching under the amended S.69 of the Cooperative Societies Act against disciplinary action."

The Deputy Director accordingly reconsidered the matter and passed an order dated 5.6.1999 upholding the decision taken by the society to dismiss the employee from service.

6. The employee took up the matter before the Cooperative Arbitration Court. But the dispute was rejected as not maintainable since the Cooperative Arbitration Court had not been set up. The employee, therefore took up the matter before the Government under the provisions of the I.D. Act, 1947 since dismissal from service under Section 2A is a deemed industrial dispute. The Government referred the issue for adjudication as per Ext.P1 reference order leading to Ext.P4 preliminary order regarding maintainability, and Ext.P5 award which are impugned

in the writ petition.

7. It will also be profitable to have a brief survey on the legal provisions pertaining to the issue referred for adjudication. Section 7-A(1) of the I.D. Act reads as follows:-

> 7-A. Tribunals.--(1) The appropriate Government may, by notification in the Official Gazette, constitute one or more Industrial Tribunals for the adjudication of industrial disputes relating to any matter, whether specified in the Second Schedule or the Third Schedule, and for performing such other functions as may be assigned to them under this Act.

Under Section 2-A, dismissal of an individual workman is to be deemed to be an industrial dispute. "Discharge or dismissal of workman including reinstatement of, or grant of relief to the workman wrongfully dismissed" is item 3 under the Second Schedule. Section 69 of the KCS Act provides for settlement of disputes. Section 69(1)(c) reads as follows:-

> 69. Disputes to be decided by Co-operative Arbitration Court and Registrar –(1)Notwithstanding anything contained in any law for the time being in force, if a dispute arises,--
>
> -x x x x x x x x x -
>
> (c) between the society or its committee and any past committee, any officer, agent or employee or any past officer, past agent or past employee or the nominee, heirs or legal representatives of any deceased officer, deceased agent or deceased employee of the society;

Under Section 69(2), certain disputes are to be deemed to be disputes. Section 69(2) reads as follows :-

> 69(2). For the purposes of sub-section (1), the following shall also be deemed to be disputes, namely:-

> (a) a claim by the society for any debt or demand due to it from a member or the nominee, heirs or legal representatives of a deceased member, whether such debt or demand be admitted or not;
>
> (b) a claim by a surety against the principal debtor, where the society has recovered from the surety any amount in respect of any debt or demand due to it from the principal debtor, as a result of the default of the principal debtor, whether such debt or demand is admitted or not;
>
> (c) any dispute arising in connection with the election of the Board of Management or any officer of the society;
>
> Explanation:--A dispute at any stage of an election commencing from the convening of the general body meeting for the election shall be deemed to be a dispute arising in connection with the election;
>
> (d) any dispute arising in connection with employment of officers and servants of the different classes of societies specified in sub-section (1) of Sec.80, including their promotion and *inter se seniority.*

8. Dispute in connection with employment of officers and servants was not an item enumerated as a dispute under Section 69 originally. However, the same was given effect to only from 2.1.2003, after setting up the Cooperative Arbitration Court. As the very name denotes, the Cooperative Arbitration Court has all the trappings of a court, vested with jurisdiction and powers to adjudicate on the disputes, and in the process, certain powers of the civil court under Section 98 of the KCS Act are also conferred on the said court. Section 98(1) reads as follows:-

> 98. Tribunal, Registrar, etc., to have certain powers of Civil Court:--(1) In exercising the functions conferred on it or him by or

> under this Act, the Tribunal, the Registrar, the arbitrator or any other person deciding a dispute and the liquidator of a society shall have all the powers of a civil court while trying a suit under the Code of Civil Procedure, 1908 (Central Act 5 of 1908), in respect of the following matters, namely:--
>
> > (a) Summoning and enforcing the attendance of any person and examining him on oath;
> >
> > (b) requiring the discovery and production of any document;
> >
> > (c) receiving evidence on affidavits; and
> >
> > (d) issuing commissions for examination of witnesses.

Rule 176 of the KCS Rules reads as follows :-

> 176. Registrar's power to rescind resolution:--Notwithstanding anything contained in the bye-laws of a registered society, it shall be competent for the Registrar to rescind any resolution of any meeting of any society or the committee of any society, if it appears to him that such resolution is ultra vires of the objects of the society, or is against the provisions of the Act, Rules, Bye-laws or of any direction or instructions issued by the Department, or calculated to disturb the peaceful and orderly working of the society or is contrary to the better interest of the society.

9. The provisions as extracted above would clearly indicate that an employee of a cooperative society registered under the provisions of the KCS Act is entitled to have his grievance, if the same constitutes a dispute under Section 69(2)(d), adjudicated before the Cooperative Arbitration Court. Prior to the introduction of Section 69(2)(d), the only recourse, after the appeal before the managing committee of the society, was under Rule 176, where the power of the Registrar is cribbed, cabined

and confined to the extent only of factors indicated under the rule, which have been succinctly dealt with in **Parappuram M.P.Cooperative Society's case** (supra) and extracted above. The question is whether in such a situation an employee did have any right to have his case adjudicated before an independent forum in the face of the decision under Rule 176.

10. The Deputy Director, for that matter, the Registrar, is a Government servant who is always answerable to the Government and who is under the administrative control of the Government. Even under Rule 176, the power of such an officer is limited. Is an employee subjected to disciplinary action, for that matter a Government servant precluded from approaching the civil court for a declaration after having exhausted the departmental remedies? The settled answer is in the negative. The Government servant is also entitled to approach this Court invoking its extraordinary jurisdiction under Article 226 of the Constitution of India seeking judicial review. Thus a Government servant gets an opportunity to have his case examined by an independent forum, a forum independent of the executive which has the trappings of a court, if the issue is considered by the administrative or such tribunals. In the case of

other employees also, the jurisdiction of the civil court in the matter of declaration is certainly not ousted and that is the settled position also. As already noted above, a decision in a disciplinary proceeding affirmed by departmental/statutory authorities can be challenged before the civil court. In this case the jurisdiction of the civil court is barred. So, the employee can approach the Industrial Tribunal, notwithstanding the order of the Deputy Director.

11. Chapter 2 Part I of Administrative Law by Sir William Wade deals with the Constitutional Foundations of the Powers of the Courts and Rule of Law. The primary meaning of rule of law is that everything must be done according to law and the affected person can always resort to the court of law. According to the author, ..."disputes as to the legality of acts of government are to be decided by judges who are independent of the executive". The principle is based on the theory of separation of powers. It is further stated that "The right to carry a dispute with the government before the ordinary courts, manned by judges of the highest independence, is an important element in the Anglo-American concept of the rule of law". Thus consideration of the grievance of an employee subjected to the

disciplinary action by a Forum, Court or Tribunal manned by persons of the highest independence, independent of the executive is a necessary concomitant of the rule of law. It is in this back ground, we have to analyse the case of the employee. As rightly held by the Division Bench, the employee has every right to have his dispute adjudicated before the Cooperative Arbitration Court, under Section 69 of the KCS Act. Only because the provision was not notified at the relevant time by setting up the Arbitration Court, the attempt of the employee was turned down and hence the reference to the Industrial Tribunal under the provisions of the I.D. Act.

12. Sri.George Poonthottam, learned counsel appearing for the management society contends that the employee having elected to pursue his grievance scrutinized by the Registrar(Deputy Director) under Rule 176 of the KCS Rules, cannot later have his case adjudicated under the provisions of the I.D.Act. Reference is invited to the decision of the Supreme Court in **National Insurance Company Limited v. Mastan and another** (2006(2) SCC 641). That was the case of a claimant pursuing his relief for compensation under the provisions of the Motor Vehicles Act as well as Workmen's Compensation Act. To

the extent relevant, the Supreme Court in the above decision held as follows :-

> "Section 167 of the 1988 Act statutorily provides for an option to the claimant stating that where the death of or bodily injury to any person gives rise to a claim for compensation under the 1988 Act as also the 1923 Act, the person entitled to compensation may without prejudice to the provisions of Chapter X claim such compensation under either of those Acts but not under both. Section 167 contains a non obstante clause providing for such an option notwithstanding anything contained in the 1923 Act.
>
> The first respondent having chosen the forum under the 1923 Act for the purpose of obtaining compensation against his employer, cannot now fall back upon the provisions of the 1988 Act therefor, inasmuch as the procedure laid down under both the Acts are different save and except those which are covered by Section 143 thereof.
>
> *Per Balasubramanyan, J.* (supplementing)
>
> A claimant who becomes entitled to claim compensation both under the Motor Vehicles Act, 1988 and under the Workmen's Compensation Act, because of a motor vehicle accident has to elect whether to make his claim under the Motor Vehicles Act, 1988 or under the Workmen's Compensation Act, 1923. By confining the claim to the authority or the Tribunal under either of the Acts, the legislature has incorporated the concept of election of remedies, insofar as the claimant is concerned.
>
> On the language of Section 167 of the Motor Vehicles Act, and going by the principle of election of remedies, a claimant opting to proceed under the Workmen's Compensation Act cannot take recourse to or draw inspiration from any of the provisions of the Motor Vehicles Act, 1988 other than what is specifically saved by Section 167 of the Act. Section 167 of the Act gives a claimant even under the Workmen's Compensation Act, the right to invoke the provisions of Chapter X of the Motor Vehicles Act, 1988 which deals with what is known as "no fault" liability in case of an accident."

There is no quarrel with the well settled legal position in the matter of the doctrine of election. For one thing it has to be noted that the respective statute itself provides for exclusion of

the remedy under another Act, once the claimant elects to have his recourse under one Act, to the extent excluded. Secondly, it has also to be noted that under either Act there is an adjudication of the grievance of the claimant regarding his claim for compensation by an independent forum. That is not the situation in the instant case. The Registrar (Deputy Director) only exercised his limited jurisdiction under Rule 176 of the KCS Rules as to whether the decision of the committee of the society was to be rescinded for the reasons enumerated under the Rule. There is no adjudication of the dispute on merits in the process. Yet another decision canvassed by the counsel is in **R.C.Tiwari v. M.P.State Cooperative Marketing Federation Ltd. and others** (1997)5 SCC 125), wherein the Supreme Court held that the dispute having been examined by the Registrar under the provisions of M.P.Cooperative Societies Act, 1960, a refernece under the Industrial Disputes Act was not maintainable. But it has to be noted that under the said Act, the Deputy Registrar, though not a court or a Tribunal constituted under the Act with a special jurisdiction, is vested with powers to adjudicate on a dispute touching on the service of the employees. Section 55 of the M.P.Cooperative Societies Act, 1960, which was subject

matter of scrutiny in **Tiwari's Case**(supra), to the extent relevant reads as follows :-

> "55. *Registrar's power to determine conditions of employment in societies*--(1) The Registrar may, from time to time frame rules governing the terms and conditions of employment in a society or class of societies and the society or class of societies to which such terms and conditions of employment are applicable shall comply with the order that may be issued by the Registrar in this behalf.
> (2) Where a dispute including a dispute regarding terms of employment, working conditions and disciplinary action taken by a society, arises between a society and its employees, the Registrar or any officer appointed by him, not below the rank of Assistant Registrar, shall decide the dispute and his decision shall be binding on the society and its employees."

Such a provision for adjudication before the Arbitration Court was introduced in Kerala only in 2003. There cannot be any comparison between an adjudication under Section 55 of the Madhya Pradesh Act quoted above and a decision of the Registrar under Rule 176 of the Kerala Cooperative Societies Rules. Thus, the said decision is also of no help to the management.

13. An employee subjected to a disciplinary action has right to have his grievance adjudicated before an independent Forum (a Forum, Tribunal, Labour Court etc.) having the trappings of a court after he has exhausted the departmental remedies. In the instant case, the employee did not get an opportunity before the Cooperative Arbitration Court since the

same had not been notified and hence the reference of the dispute by the Government before the Industrial Tribunal is certainly valid. The decision of the Deputy Director cannot stand in her way. The worker must be conceded right to raise an industrial dispute contending that her dismissal affirmed by the managing committee and the Deputy Director is bad in law. However, we may clarify the legal position that if the remedy under the statute is before a forum akin to court, which is bound to follow judicial procedure and its decision is made final by the statute, the position would be different.

14. On merits, it appears the matter has to be remitted to the Industrial Tribunal. The Tribunal rested its conclusions regarding the domestic enquiry leading to the disciplinary action on two grounds; (1) the High Court had already directed to conduct a fresh enquiry, in the judgment in O.P.No.22912/97 and (2) the enquiry is conducted in violation of the principles of natural justice. As we have already noted above, one of the two reasons falls to ground since the direction by the learned Single Judge in the judgment in O.P.No.22912/97 had already been set aside in W.A.898/1998 in the reported decision referred to above. We do not know whether the Tribunal would

have reached the same conclusions on the remaining ground. Therefore, it will be only appropriate that the matter is remitted to the Tribunal with a direction to consider the preliminary point regarding the validity of the domestic enquiry, ignoring the judgment of this Court in O.P.No.22912/97. Ordered accordingly and the Writ Appeal is allowed as follows :-

(1) The judgment of the learned Single Judge is set aside.

(2) It is declared that Ext.P1 reference to the Industrial Tribunal is valid. Exts.P4 preliminary order as well as Ext.P5 award will stand quashed for the limited purpose of examining the case afresh in the light of the directions and observations contained in this judgment.

(3) The Tribunal shall dispose of the matter within a period of four months from the date of receipt of a copy of the judgment. We make it clear that we have not expressed any opinion as to the merits of the case in the matter of disciplinary action and it is for the Industrial Tribunal to adjudicate on the same and pass an award on merits. The same shall be done as

expeditiously as possible, at any rate, within four months from the date of production of a copy of this judgment.

V.K.BALI, CHIEF JUSTICE.

KURIAN JOSEPH, JUDGE.

K.BALAKRISHNAN NAIR, JUDGE.

tgs

KURIAN JOSEPH & A.K.BASHEER, JJ

W.P.(C) NO. OF 2004

J U D G M E N T

Dated 5th January, 2007.